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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Hubert Washington Jr.,

10 Petitioner,

11 v.

12 Charles L. Ryan, et al.,

13 Respondents.

No. CV-13-01317-TUC-BPV

ORDER

14 On October 9, 2013, Hubert Washington Jr., (“Petitioner”), an inmate confined in
15 the Central Arizona Correctional Facility in Florence, filed an unsigned *pro se* Petition
16 for Writ of Habeas Corpus by a person in state custody, pursuant to title 28, U.S.C. §
17 2254. (Doc. 1.)¹ In an Order dated December 6, 2013, the Court required Petitioner to
18 complete and sign a Certificate certifying that Petitioner’s signature on the Certificate
19 shall serve as an original signature on his § 2254 Petition. On December 16, 2013,
20 Petitioner returned the completed and signed Certificate. Before this Court are the
21 Petition, Respondents’ Answer with accompanying exhibits² (Doc. 12), and Petitioner’s
22 Reply with accompanying exhibits³ (Doc. 17).

23 In accordance with provisions of Title 28, U.S.C. § 636(c)(1), all parties consented
24 to proceed before a United States Magistrate Judge to conduct any and all further
25 proceedings in this case, including trial and entry of a final judgment, with direct review

26 ¹ “Doc.” refers to the documents in this Court’s file.

27 ² The Court refers to Respondents’ exhibits as (Resp. Exs. ____).

28 ³ The Court refers to Petitioner’s exhibits attached to the Reply as (Pet. Exs. ____).

1 by the Ninth Circuit Court of Appeals if an appeal is filed. (Docs. 15 & 16.)

2 For the reasons discussed below, the Magistrate dismisses the second claim of
3 Ground One, and Grounds Two through Three.

4 **I. Factual and Procedural Background**

5 A. Trial Court Proceedings

6 After a four-day jury trial, Petitioner, Hubert Washington Jr. was convicted in Pima
7 County Superior Court, case # CR-20080469, of two counts of sexual assault. (Resp. Ex.
8 A at 2.) On March 16, 2009, he was sentenced to consecutive prison terms totaling twelve
9 years and three months. (Resp. Ex. B at 2-3.)

10 B. Direct Appeal

11 Petitioner, through counsel, timely filed an appeal raising three issues of trial court
12 error: (1) the trial court failed to strike the panel for cause; (2) the trial court precluded
13 relevant evidence in violation of Petitioner's constitutional rights; and (3) the trial court's
14 instructions were in error. (Resp. Ex. G.) On February 5, 2010, the Arizona Court of
15 Appeals issued a memorandum decision affirming the convictions and sentences. (Resp.
16 Ex. J.) On September 22, 2010, the Arizona Supreme Court denied a petition for review
17 of the appellate court's decision. (Resp. Ex. M.)

18 C. Petition for Post-Conviction Relief

19 On March 23, 2009, Petitioner filed a first notice of post-conviction relief. (Resp.
20 Ex. D.) The trial court appointed counsel, but stayed the Rule 32 Petition pending the
21 appeal, directing Petitioner to file a notice upon stay or completion of the appeal. (Resp.
22 Ex. E.) On November 24, 2010, Petitioner filed a second notice of post-conviction relief.
23 (Resp. Ex. N.) On March 15, 2011, Petitioner, through counsel, filed a petition for post-
24 conviction relief (PCR) asserting that he was deprived of his state and federal
25 constitutional rights to the effective assistance of counsel because trial counsel failed to
26 object to the jury instruction defining sexual assault incorrectly by eliminating the *mens*
27 *rea* as to the lack of consent, and appellate counsel failed to raise this issue as
28 fundamental error. (Resp. Ex. Q.) Petitioner also argued that trial counsel was ineffective
for failing to object to improper vouching by the prosecutor during closing arguments. *Id.*

1 On June 15, 2011, the trial court summarily denied the petition. (Resp. Ex. U.)

2 Petitioner filed a *pro se* motion for rehearing in the trial court. (Resp. Ex. V.) The
3 court denied the motion for rehearing, finding that Petitioner was not entitled to hybrid
4 representation and was therefore “not granted leave to file the motion.” (Resp. Ex. W.)

5 Petitioner, through counsel, filed a petition for review from the trial court’s denial
6 of PCR relief in the court of appeals. (Resp. Ex. X.) Thereafter, the Petitioner filed a
7 motion to permit the filing of supplemental authority in support of his argument that the
8 jury instruction given by the trial court was fundamental error. (Resp. Ex. Y.) The
9 appellate court granted the motion to supplement. (Resp. Ex. Z.) On November 18, 2011,
10 in a memorandum decision, the court of appeals granted review of Petitioner’s petition
11 for review of the trial court’s denial of his PCR, but denied relief. (Resp. Ex. CC.)

12 Petitioner filed a petition for further review of this decision with the Arizona
13 Supreme Court. Resp. (Ex. FF.) The Arizona Supreme Court denied the petition for
14 further review on May 30, 2012. The mandate was issued by the appellate court on
15 October 15, 2012. (Pet. Ex. M.)

16 D. Federal Habeas Petition

17 Washington filed this Petition for writ of habeas corpus in this Court on October 9,
18 2013. (Doc. 1.) Petitioner raises three grounds for relief. In Ground One, Petitioner
19 alleges that he was denied effective assistance of counsel, in violation of the Sixth
20 Amendment, because his attorney failed to object to the prosecutor’s alleged violations of
21 Petitioner’s Fifth and Fourteenth Amendment due process rights. In Ground Two,
22 Petitioner alleges that his Fifth and Fourteenth Amendment due process rights were
23 violated by a jury instruction that misstated the law about sexual assault. In Ground
24 Three, Petitioner alleges that his Fifth and Fourteenth Amendment due process rights
25 were violated during the prosecutor’s closing argument. Petitioner states that he has
26 presented all three grounds to the Arizona Court of Appeals.

27 **II. Discussion**

28 A. Standard of Review

Because Washington filed his petition after April 24, 1996, this case is governed

1 by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)
2 (“AEDPA”).

3 B. Timeliness

4 A one year period of limitation shall apply to an application for writ of habeas
5 corpus by a person in custody pursuant to the judgment of a State court. 28 U.S.C. §
6 2244(d)(1).

7 Under the AEDPA, a state prisoner must generally file a petition for writ of habeas
8 corpus within one year from “the date on which the judgment became final by the
9 conclusion of direct review or the expiration of time for seeking such review [.]” 28
10 U.S.C. § 2244(d)(1)(A).

11 The running of this one-year statute of limitations on habeas petitions for state
12 convictions is tolled during any period when "a properly filed application for state post-
13 conviction or other collateral review with respect to the pertinent judgment or claim is
14 pending" in any state court. *See* 28 U.S.C. § 2244(d)(2). Thus, the statute of limitations
15 is tolled during the pendency of a state court action for post-conviction relief. 28 U.S.C.
16 § 2244(d)(2).

17 An application contemplated by section 2244(d)(2) is properly filed "when its
18 delivery and acceptance are in compliance with the applicable laws and rules governing
19 filings. These usually prescribe, for example, the form of the document, the time limits
20 upon its delivery, the court and office in which it must be lodged, and the requisite filing
21 fee." *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (footnote omitted). The United States
22 Supreme Court has held that untimely state post-conviction petitions are not “properly
23 filed” under AEDPA, and do not toll AEDPA's statute of limitations. *Pace v.*
24 *DiGuglielmo*, 544 U.S. 408 (2005).

25 C. Analysis

26 The Magistrate Judge finds that, pursuant to the AEDPA, the Petition filed in this
27 Court is timely. Washington had until one year after his conviction and sentence became
28 final to file his federal petition.

1 1. *Limitation Period Under § 2244 (d) (1) (A)*

2 Petitioner's convictions and sentences became final on December 22, 2010, ninety
3 (90) days after his direct appeal was denied by the Arizona Supreme Court on September
4 22, 2010, when the time for filing a petition for a writ of certiorari from the United States
5 Supreme Court expired. *See* 28 U.S.C. § 2244(d)(1)(A); Sup.Ct.R. 13; *Wixom v.*
6 *Washington*, 264 F.3d 894, 897 (9th Cir. 2001) (judgment becomes final either by the
7 conclusion of direct review by the highest court, including the United States Supreme
8 Court, or by the expiration of the time to seek such review). Accordingly, Petitioner was
9 required to file his petition for writ of habeas corpus within one year of the date his
10 convictions became final, *i.e.*, one year from December 22, 2010. Absent any statutory or
11 equitable tolling periods, Petitioner's right to file a federal habeas petition expired on
12 December 22, 2011. *See Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001)
13 (calculating the AEDPA's one-year statute of limitations using the "anniversary method"
14 of Rule 6(a) of the Federal Rules of Civil Procedure).

15 2. *Statutory Tolling*

16 The limitations period was tolled immediately, however, by the pendency of
17 Petitioner's first PCR. *See* 28 U.S.C. § 2244(d)(2). There was no gap between the
18 conclusion of direct review, and Washington's properly filed notice of PCR. *See Isley v.*
19 *Arizona Dept. of Corrections*, 383 F.3d 1054 (9th Cir. 2004) (state petition is "pending"
20 within the meaning of 28 U.S.C. § 2244(d)(2) when properly filed notice of post-
21 conviction relief is filed). Thus, the issue is not when direct review became final under §
22 2244(d)(1)(A), rather, this Court must determine how long Washington's petition for
23 post-conviction relief was "pending" for purposes of tolling the limitations period
24 pursuant to § 2244(d)(2).

25 Respondents contend that the statutory tolling period ended on May 30, 2012
26 when the Arizona Supreme Court denied review of the Arizona Court of Appeals'
27 decision in the PCR proceeding. (Answer at 5.) According to Respondents, Petitioner
28 then had until May 30, 2013 to seek federal habeas relief. (*Id.*) Petitioner counters that
her federal petition is timely filed because the statutory tolling period did not end until

1 the Arizona Court of Appeals issued the mandate on October 15, 2012. (Petition at 11;
2 Pet Ex. M)

3 Contrary to the Respondents' assertion that the state post-conviction proceeding
4 concluded for purposes of statutory tolling when the Arizona Supreme Court denied,
5 review, in this situation it is the mandate, not the memorandum decision, that concludes
6 the tolling period; state law determines the conclusion of collateral review and thus, state
7 law also determines the conclusion of statutory tolling under the AEDPA. *See Hemmerle*
8 *v. Schriro*, 495 F.3d 1069, 1077 (9th Cir. 2007). "In Arizona, when the court of appeals
9 grants review of a petition, but denies the petition, direct review is not final until the
10 mandate has issued." *Ramon v. Ryan*, 2010 WL 3564819, *6 (D.Ariz. 2010) (citing
11 *Ariz.R.Crim.P.* 31.23(a)(2)); *see also Celaya v. Stewart*, 691 F.Supp.2d 1046, 1055, 1074–
12 1075, (D.Ariz. 2010) (adopting magistrate judge's conclusion that PCR petition "was
13 pending, as the Supreme Court has defined that term in *Carey [v. Saffold]*, 536 U.S. 214
14 (2002)], until it reached final resolution upon issuance of the court of appeals
15 mandate....", and finding "under Arizona law, the Petitioner is entitled to statutory tolling
16 because an Arizona appellate court decision is not final until the mandate issues")
17 (collecting cases holding that conviction becomes final on date either the appellate court
18 or state supreme court issues the mandate), *aff'd* 497 Fed.Appx. 744 (9th Cir.
19 2012)("Under Arizona law, [petitioner's] post-conviction review ... petition was
20 'pending' until the Arizona Court of Appeals issued the mandate concluding its review of
21 that petition....").

22 Arizona Rules of Criminal Procedure provide, in pertinent part, that in cases where
23 the petitioner seeks review of the appellate court's decision, the appellate court "shall not
24 issue a mandate until 5 days after the receipt" of an order denying review. *Ariz.R.Crim.P.*
25 31.21(a)(3); *see also* A.R.S. § 12–120.24 ("upon the receipt from the clerk of the
26 supreme court of notification that the request for review has been denied, the clerk of the
27 division [of the appellate court] shall, if the matter has been decided by formal opinion,
28 issue the mandate of the court of appeals, if no written formal opinion has been rendered
then by certified copy of the order of the court."). Further, in a case where the appellate

1 court had issued a memorandum opinion, the Arizona Supreme Court has explained that
2 “[i]f this court denies the petition and cross petition for review, the Court of Appeals
3 issues the mandate to the trial court....This procedure comports with the notion that the
4 court which makes the binding decision should issue the mandate.” *State v. Ikirt*, 160
5 Ariz. 113 (1989) (citing Ariz.R.Crim.P. 31.19(h)); see also *Borrow v. El Dorado Lodge,*
6 *Inc.*, 75 Ariz. 218, 220 (1953) (an appellate court's decision becomes effective “under our
7 practice, [on] the date of issuance of ... the mandate”) (citation omitted).

8 Respondents' reliance on the Ninth Circuit's decision in *Hemmerle* is also
9 misplaced given that *Hemmerle* did not involve a situation where, like the instant case,
10 the appellate court granted review but denied relief in the post-conviction proceeding.
11 Instead, *Hemmerle*, in pertinent part, addressed whether a letter issued from the clerk of
12 the court of appeals facilitating the performance of the ministerial function of returning
13 the record to the trial court after the Arizona Supreme Court's denial of review factored
14 into the tolling period under section 2244(d)(2). *Hemmerle*, 495 F.3d at 1077. In deciding
15 that the post-conviction proceeding was not pending for purposes of AEDPA's tolling
16 provision when the letter issued, the *Hemmerle* court pointed out that the letter was not a
17 mandate, nor was it the equivalent to the issuance of a mandate. *Id.* On the instant facts,
18 the AEDPA statute of limitations was tolled until October 15, 2012 when the mandate
19 issued in the post-conviction relief proceedings. See *Celaya*, 691 F.Supp.2d at 1055,
20 1074–1075; *Ramon*, 2010 WL 3564819, at *6. Petitioner had one year from that date to
21 file his federal habeas petition. Petitioner's federal habeas action commenced on October
22 9, 2013 is timely filed under the AEDPA.

23 D. Procedural Default

24 In Ground One, Petitioner alleges that he was denied effective assistance of
25 counsel, in violation of the Sixth Amendment, because his attorney failed to object to the
26 prosecutor's alleged violations of Petitioner's Fifth and Fourteenth Amendment due
27 process rights. In Ground Two, Petitioner alleges that his Fifth and Fourteenth
28 Amendment due process rights were violated by a jury instruction that misstated the law
about sexual assault. In Ground Three, Petitioner alleges that his Fifth and Fourteenth

1 Amendment due process rights were violated during the prosecutor's closing argument.

2 Respondents assert that Petitioner has procedurally defaulted all but one subclaim
3 asserted in Ground One, and all of Grounds Two and Three. The undersigned agrees with
4 Respondents in part, and finds that two subclaims in Ground One are not procedurally
5 defaulted: Petitioner's claim that trial counsel failed to object to the jury instruction
6 defining sexual assault because the instruction incorrectly eliminated the *mens rea* as to
7 the lack of consent and his claim that trial counsel failed to object to prosecutorial
8 vouching regarding the victim's statements in the 911 call. The remaining subclaim in
9 Ground One, and Grounds Two through Three are procedurally defaulted.

10 A writ of habeas corpus may not be granted unless it appears that a petitioner has
11 exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1); *see also Coleman v.*
12 *Thompson*, 501 U.S. 722, 731 (1991). To exhaust state remedies, a petitioner must "fairly
13 present" the operative facts and the federal legal theory of his claims to the state's highest
14 court in a procedurally appropriate manner. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848
15 (1999); *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Connor*, 404 U.S. 270, 277–
16 78 (1971).

17 "To exhaust one's state court remedies in Arizona, a petitioner must first raise the
18 claim in a direct appeal or collaterally attack his conviction in a petition for post-
19 conviction relief pursuant to Rule 32." *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir.
20 1994). The failure to exhaust subjects the petitioner to dismissal. *Gutierrez v. Griggs*, 695
21 F.2d 1195 (9th Cir. 1983).

22 A habeas petitioner's claims may be precluded from federal review in two ways.
23 First, a claim may be procedurally defaulted in federal court if it was actually raised in
24 state court but found by that court to be defaulted on state procedural grounds. *Coleman*,
25 501 U.S. at 729–30. Second, a claim may be procedurally defaulted if the petitioner failed
26 to present it in state court and "the court to which the petitioner would be required to
27 present his claims in order to meet the exhaustion requirement would now find the claims
28 procedurally barred." *Coleman*, 501 U.S. at 735 n. 1; *see also Ortiz v. Stewart*, 149 F.3d
923, 931 (9th Cir. 1998) (stating that the district court must consider whether the claim

1 could be pursued by any presently available state remedy). If no remedies are currently
2 available pursuant to Rule 32, the claim is “technically” exhausted but procedurally
3 defaulted. *Coleman*, 501 U.S. at 732, 735 n. 1; *see also Gray v. Netherland*, 518 U.S.
4 152, 161-62 (1996).

5 In Arizona, claims not previously presented to the state courts on either direct
6 appeal or collateral review are generally barred from federal review because any attempt
7 to return to state court to present them would be futile unless the claims fit into a narrow
8 range of exceptions. *See* Ariz.R.Crim.P. 32.1(d)-(h), 32.2(a) (precluding claims not raised
9 on direct appeal or in prior post-conviction relief petitions), 32.4(a) (time bar), 32.9(c)
10 (petition for review must be filed within thirty days of trial court’s decision). Because
11 these rules have been found to be consistently and regularly followed, and because they
12 are independent of federal law, either their specific application to a claim by an Arizona
13 court, or their operation to preclude a return to state court to exhaust a claim, will
14 procedurally bar subsequent review of the merits of such a claim by a federal habeas
15 court. *Stewart v. Smith*, 536 U.S. 856, 860 (2002); *Ortiz*, 149 F.3d at 931–32 (finding
16 Rule 32.2(a)(3) regularly followed and adequate).

17 Because the doctrine of procedural default is based on comity, not jurisdiction,
18 federal courts retain the power to consider the merits of procedurally defaulted claims.
19 *Reed v. Ross*, 468 U.S. 1, 9 (1984). However, the Court will not review the merits of a
20 procedurally defaulted claim unless a petitioner demonstrates legitimate cause for the
21 failure to properly exhaust the claim in state court and prejudice from the alleged
22 constitutional violation, or shows that a fundamental miscarriage of justice would result if
23 the claim were not heard on the merits in federal court. *Coleman*, 501 U.S. at 750.

24 Cause is defined as a "legitimate excuse for the default," and prejudice is defined
25 as "actual harm resulting from the alleged constitutional violation." *Thomas v. Lewis*, 945
26 F.2d 1119, 1123 (9th Cir. 1991); *see Murray v. Carrier*, 477 U.S. 478, 488 (1986) (a
27 showing of cause requires a petitioner to show that "some objective factor external to the
28 defense impeded counsel's efforts to comply with the State's procedural rule"). Prejudice
need not be addressed if a petitioner fails to show cause. *Thomas*, 945 F.2d at 1123 n.10.

1 To bring himself within the narrow class of cases that implicate a fundamental
 2 miscarriage of justice, a petitioner "must come forward with sufficient proof of his actual
 3 innocence" *Sistrunk v. Armenakis*, 292 F.3d 669, 672-73 (9th Cir. 2002) (internal
 4 quotation marks and citations omitted), which can be shown when "a petitioner 'presents
 5 evidence of innocence so strong that a court cannot have confidence in the outcome of
 6 the trial unless the court is also satisfied that the trial was free of nonharmless
 7 constitutional error.'" *Id.* at 673 (quoting *Schlup v. Delo*, 513 U.S. 298, 316 (1995)).

8 1. Ground One

9 Petitioner asserts in Ground One of the Petition that his trial counsel was
 10 ineffective by failing to object to the prosecutor's violation of his right to due process.
 11 (Petition at 6.) Specifically, Petitioner objects to counsel's failure to object to (a) the
 12 prosecutor's misleading of the jury as to the appropriate law; (b) the prosecutor's
 13 assertion that the victim could not consent because he was mentally impaired; and (c)
 14 counsel's failure to object to the prosecutor vouching for the victim by invoking the
 15 victim's call to the 911 operator. (*Id.*)

16 Regarding Ground One (a), Petitioner argues in his Petition that his counsel was
 17 ineffective for failing to object to the prosecutor's violation of his right to due process
 18 because "the Prosecutor misled the jury on the law she claims I violated by leaving out,
 19 [i]ntentionally or [k]nowingly, from 13-1406, any variation on what's already written is a
 20 violation of my fifth and fourteenth amendment rights, and my attorney knew the
 21 Prosecutor was going to do this because it was discussed between the judge, Prosecutor,
 22 and Mr, Kingston my defence [sic] attorney." (Petition at 6.)

23 While Respondents do not concede that this claim was exhausted in the state
 24 courts, this Court finds that, construing the instant Petition liberally, as this Court must
 25 do⁴, Petitioner exhausted this claim in his PCR, arguing that "[t]he jury instruction

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 27 ⁴ A document filed *pro se* is "to be liberally construed," *Estelle v. Gamble*, 429
 28 U.S. 97, 106 (1976), and "a pro se complaint, however inartfully pleaded, must be held to
 less stringent standards than formal pleadings drafted by lawyers," *ibid.* (internal
 quotation marks omitted). *Cf.* Fed. Rule Civ. Proc. 8(f) ("All pleadings shall be so
 construed as to do substantial justice").

1 defining sexual assault incorrectly eliminated the requirement that Washington knew the
2 sexual contact was against [the victim's] consent. Washington received ineffective
3 assistance at trial because his attorney did not object to the instruction.” (Resp. Ex. Q. at
4 2.) Petitioner next argued that the trial court’s denial of this claim was error to the
5 appellate court by arguing that “[t]he trial court’s offense instruction was a patent
6 misstatement of the law and eliminated the *mens rea* for an offense element. ... The
7 court’s prejudice analysis confuses the question of the victim’s consent with whether
8 Washington knew the victim had not consented.” (Resp. Ex. BB at 9.) The appellate court
9 acknowledged that both trial and appellate counsel had an “apparently meritorious claim
10 that the jury instruction incorrectly stated the law” but that Petitioner did not establish a
11 colorable claim that his counsel’s conduct fell below prevailing professional norms, and
12 the trial court did not err in summarily denying that claim. (Resp. Ex. BB at 3-6.)

13 The Court considers, for purposes of this Petition, that Petitioner is arguing that
14 trial counsel failed to object to an improper jury instruction. It is irrelevant whether the
15 Petitioner attributes the source of the jury instruction to the prosecutor or the trial court,
16 or even to his own trial counsel, as the claim is ineffective assistance of counsel, and the
17 source of the claim is the deficient performance of his counsel in failing to object to the
18 jury instruction, regardless of its source.

19 Respondents concede that Petitioner presented Ground One (c), counsel’s failure
20 to object to the prosecutor vouching for the victim by invoking the victim’s call to the
21 911 operator, to the state courts. Accordingly, the Court will call for an answer from
22 Respondents addressing the merits of Ground One(a) and (c).

23 In Ground One (b), Petitioner argues that trial counsel failed to object to the
24 prosecutor’s assertion that the victim could not consent because he was mentally
25 impaired. (Petition, at 6.) Respondents correctly assert that Petitioner failed to fairly
26 present and exhaust this claim and cannot now return to state court to properly exhaust
27 this claim, thus, Ground One (b) is technically exhausted but procedurally defaulted.
28 (Answer at 11.)

Petitioner did not present this claim to the state courts in his post-conviction

1 proceedings. (Resp. Ex. Q & X.) Thus, Petitioner has failed to fairly present and exhaust
2 this claim. *See Baldwin v. Reese*, 541 U.S. 27, 32 (2004); *Castillo v. McFadden*, 399 F.3d
3 993, 1000 (9th Cir. 2005) (“To exhaust his claim, Castillo must have presented his
4 federal, constitutional issue before the Arizona Court of Appeals within the four corners
5 of his appellate briefing.”). Petitioner cannot return to state court and properly exhaust
6 any such claim. *See* Ariz. R. Crim. P. 32.2, 32.4(a); *State v. Mata*, 185 Ariz. 319, 334–
7 336 (1996). Accordingly, Ground One (b) of the Petition is technically exhausted but
8 procedurally defaulted. *See Coleman*, 501 U.S. at 735 n.1. Petitioner has not alleged
9 cause and prejudice or a fundamental miscarriage of justice to overcome these defaults.
10 *See id.*, 501 U.S. at 750. Thus, the Court dismisses this claim.

11 2. Grounds Two and Three

12 In Ground Two, Petitioner alleges that his Fifth and Fourteenth Amendment due
13 process rights were violated by a jury instruction that misstated the law about sexual
14 assault. (Petition at 7.) In Ground Three, Petitioner alleges that his Fifth and Fourteenth
15 Amendment due process rights were violated during the prosecutor’s closing argument.
16 (Petition at 8.)

17 Respondents correctly assert that Petitioner failed to fairly present and exhaust
18 these claims and cannot now return to state court to properly exhaust these claims, thus,
19 Grounds Two and Three are technically exhausted but procedurally defaulted. (Answer
20 at 11-12.)

21 Petitioner did not present these claims to the state courts in his appellate or post-
22 conviction proceedings. (Resp. Ex. G, Q, X.) Thus, Petitioner has failed to fairly present
23 and exhaust these claims. *See Baldwin*, 541 U.S. at 32; *Castillo*, 399 F.3d at 1000.
24 Petitioner cannot return to state court and properly exhaust any such claims. *See* Ariz. R.
25 Crim. P. 32.2, 32.4(a); *Mata*, 185 Ariz. at 334–336. Accordingly, Grounds Two and
26 Three of the Petition are technically exhausted but procedurally defaulted. *See Coleman*,
27 501 U.S. at 735 n.1. Petitioner has not alleged cause and prejudice or a fundamental
28 miscarriage of justice to overcome these defaults. *See Coleman*, 501 U.S. at 750. Thus,

1 the Court dismisses these claims.

2 Accordingly,

3 IT IS ORDERED:

4 (1) Ground One (b) and Grounds Two and Three are dismissed;

5 (2) Respondents shall file a supplemental answer, addressing Ground One (a)
6 and (c), within thirty days of the filing date of this order.

7 (3) Petitioner may file a supplemental reply within thirty days from the date of
8 service of the supplemental answer addressing Ground One (a) and (c) only.

9 The Court will take the matter under advisement upon receipt of the supplemental
10 briefing.

11 Dated this 21st day of January, 2015.

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14 Bernardo P. Velasco
15 United States Magistrate Judge
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